



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**CRIMINAL APPEAL NO. 206 OF 2009**

*(From original conviction and sentence in Criminal Case No.146 of 2007 of the  
Senior Principal Magistrate's Court at Naivasha - Nduku Njuki, SRM)*

**HARON LOSIRIAN**

**MARIGET.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDE  
NT**

**JUDGMENT**

The appellant was charged with the offence of committing an unnatural act contrary to Section 5(1)(a) of the Sexual Offences Act, 2006 (*No. 3 of 2006*), and was on the evidence convicted and sentenced to fifteen (15) years imprisonment.

He appealed to this court on five grounds alleging that his rights under Article 49(1)(f)(i) & (ii) of the Constitution had been violated, that the charge sheet was defective, that he did not understand the language of the court, that essential witnesses were not called to testify, that the evidence upon which he was convicted was inconsistent.

When this appeal came up for hearing on 26.10.2011, the appellant told the court that he was not ready to proceed with the appeal. However, Mr. Omwega learned Senior Principal State Counsel informed the court that he was conceding the appeal on a point of law and that there was no need to adjourn the appeal to the next session.

The learned State Counsel conceded the appeal on the principal ground that the prosecution's case was based on the wrong law, and that the charge sheet was to that extent incurably defective. Counsel explained that the appellant was charged under the provisions of Section 5(1)(a) of the Sexual Offences Act, 2006 (*No. 3 of 2006*). It says that -

***"any person who unlawfully penetrates the genital organs of another person with -***

***(1) any part of the body of another or that person -.. commits the offence called sexual assault."***

That section does not create the offence known as "**unnatural offence**". Mr. Omwega, submitted that the crimes known as "**unnatural offences**" are created under Section 162 of the Penal Code. Such offences are basically offences against the order of nature - "**sodomy**" to have carnal knowledge of any person against the order of nature, or to have carnal knowledge of an animal. These offences, if found guilty,

carry a maximum sentence of fourteen years imprisonment.

The accused was charged under the wrong law, and the charge is not curable under Section 382 of the Criminal Procedure Code, (*Cap. 75, Laws of Kenya*). This Section, provides a cure where there is an error in a finding, sentence or order of court, unless, that error, omission or irregularity has occasioned a failure of justice. Although ignorance of the law is no defence, in this case, the appellant was unrepresented, he is a peasant boy, unaware of either the language or intricacies of the law. He would not have raised the issue during his trial as is required by the proviso to Section 382 aforesaid. In the circumstances, to charge the appellant under a provision of law which did not create the offence went to the heart of the prosecution's case. It could not be sustained. It was outside the law, even though there was ample evidence to sustain an offence under Section 162 of the Penal Code.

For those reasons, the appellant's appeal succeeds, the conviction by the lower court is quashed the sentence set aside and unless there are lawful grounds for holding him, the appellant be set free forthwith. He is warned, not to commit such crimes again.

It is so ordered.

**Dated, signed and delivered at Nakuru this 18<sup>th</sup> day of November, 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**